THE LABOUR COURT OF SOUTH AFRICA

AT CAPE TOWN

Of interest to other judges

Case no: C 91/2022

In the matter between:

MMATLAWA NTEBOGENG NADINE PASHA	**Plaintiff**

and

PANDORA JEWELLERY SOUTH AFRICA (PTY) LTD	**Defendant**

Delivered: 7 April 2025

Summary: (Claim for unpaid bonus commission – Concession made by defendant in pre-trial minute not at odds with the facts - Claim not proven on a balance of probabilities – with prejudice offer of settlement made -costs – civil matter – costs awarded on magistrates court scale)

JUDGMENT

LAGRANGE J

Introduction

[1] The plaintiff, Ms N Phasha ('Phasha') claims she was due payment of a bonus commission from the defendant ('Pandora') for the month of November 2021, amounting to R 44,000. This was based on the store in which she worked in the V&A Waterfront achieving 525,5 % of the stipulated sales target. Instead, Phasha was only paid a bonus commission of R 3,000. She is claiming the balance of R 41,000, which she says is due to her. Pandora contends that Phasha's claim was based on a 525,5% target was plainly an error, which it was entitled to correct, but in any event denies it was contractually obliged to pay any bonus commission.

[2] At the commencement of the trial proceedings, Pandora raised an *in limine* issue, which had been pleaded as part of its defence, but not raised as a matter to be determined before the trial could start. It claimed that on 3 July 2021, a new performance incentive scheme was agreed to by Phasha, which stipulated that it replaced all previous commission structures in her contract of employment, which included the bonus commission scheme. Accordingly, it argued there was no contractual basis for her claim to the bonus commission for November 2021. Phasha claimed it was necessary to lead oral evidence to determine this preliminary issue and, after hearing oral argument from the parties, the court agreed to hear oral evidence before determining this preliminary issue.

[3] Only Phasha gave evidence. After hearing evidence and argument, the court dismissed Pandora's *in limine* point. In consequence, the only point resolved by the *in limine* ruling was that whatever the prevailing

contractual bonus scheme was, it was not amended by her written acknowledgment of a new performance incentive scheme on 3 July 2021.

[4] By the time the trial resumed on 10 June 2024, the parties had agreed that no further evidence would be led and that the merits of the claim should be argued. Before it resumed, Pandora had made an offer, with prejudice, to settle the dispute by offering to pay the capital amount and interest claimed by Phasha and to pay her costs at the magistrates' court scale. However, Phasha rejected the offer of settlement, apparently because she could not agree to the amount tendered for her costs. Consequently, the parties proceeded to argue the merits of the case on the second day of the trial.

Merits

[5] It was common cause as reflected in the pre-trial minute, that :

> "2.2 Initially, in addition to the applicant's salary, she was entitled to earn a commission, which was a monthly commission on the percentage achievement of the sales budget, above 50 % and
>
> 2.3 The Applicant was further entitled to receive a bonus commission monthly in arrears, calculated at R 1,000-00 for every 10 % that the sales target is exceeded."

[6] Pandora's defence was that the commission structure set out in the paragraphs above had been amended by the new performance incentive scheme which took effect on 1 July and Phasha had agreed to on 3 July 2021. On the face of the preliminary ruling, that defence should have fallen away.

[7] Pandora relies on two other arguments. Firstly, notwithstanding the *in limine* finding, it argued that Phasha had failed to prove the existence of the written contract she had relied on in her statement of case. Secondly, it had pleaded that the target for November 2021 was erroneously calculated and recorded as R 92,745.00, whereas the correct target was R

550,000.00. Moreover, any amendment of the target was legally binding on all affected employees, including Phasha.

[8] In her statement of case, Phasha had claimed that she had been employed by Pandora on 4 December 2017 under a written contract, which *inter alia* provided for payment of a bonus commission as set out in the provisions of the pre-trial minute cited in paragraph 5 above. That contract had been amended on 15 May 2019. A copy of the signed amendment was attached to her statement of claim. That amendment concerned her appointment as a store manager. At the end of the amendment, it was confirmed that:

> All terms and conditions of original signed employment contract are still applicable and remain valid during employment with Pandora Jewellery South Africa (Pty) Ltd."

(*sic*)

Accordingly, to the extent that she was contractually entitled to the bonus commission before signing the amendment, she retained that entitlement.

[9] It is common cause, Phasha could not produce a copy of the original written contract on which her claim was based. However, whether she was able to produce that document or not, Pandora had agreed in the pre-trial minute that Phasha was entitled to the bonus commission described in paragraphs 2.2 and 2.3 of the minute. It did not dispute her entitlement but only contended that it had been scrapped when she agreed to a new performance incentive scheme in July 2021, which contention fell away with the *in limine* finding.

[10] That being the case, whether Phasha could provide a copy of the original written contract or not, Pandora had conceded her entitlement to the bonus commission in question. It was also not contended that no bonus commission was payable for November 2021, only that the amount due was far less than what Phasha claimed because her claim was based on a patently erroneous calculation. In conclusion, I cannot agree that the failure of Phasha to produce the written contract in question is fatal to her claim she was contractually entitled to the bonus commission, given that

the very basis of Pandora's primary defence was that the entitlement had been done away with when the new performance incentive had been introduced, which defence has been disposed of by the *in limine* finding. It was not necessary for her to amend her statement of claim in view of the Pandora's admission that she had an entitlement to the bonus.

[11] However, Pandora persists in arguing that merely because it appears that it had admitted she had been entitled to the bonus provision before the purported amendment in July 2021, that does not mean the court should accept that her prior contractual entitlement was established. In support of this argument, Pandora cited the case of *Fourie v Sentrasure BPK* [1] which affirmed the following dictum in *Rance v Union Mercantile Co Ltd* [2], in which it was stated:

> 'When an admission is formally pleaded, it as a rule corresponds to fact. But what if it does not? In such a case the party making the admission is no doubt bound to the extent of the admission (as long as it stands), but assuming that the admission is not in accordance with fact, a court of law by assuming its correctness and by building upon it for the purpose of ascertaining the limits of the contract erroneously admitted, may find a contract proved which has no existence in fact, and which but for such admission it would not have found to be proved. This shows that it is not always safe to build further upon the mere admission of a contract. The fact of the matter is the party making the admission is bound by it to the extent to which the admission goes. To press it against him beyond that, under all circumstances, may lead to inequitable results.'[3]

[12] However, in this case, it is by no means obvious that the concessions made by Pandora were plainly at odds with other evidence to the contrary. All that can be said is that Phasha had failed to produce the actual contract she concluded in 2017. However, an unsigned contract of a store manager contained the contract provision dealing with the bonus

[1] 1997(4) SA 950 (NC)

[2] 1922 AD 312

[3] *Rance* at 315.

commission in question and, it was undisputed that she was paid the bonus commission in accordance with the formula which appears there. Moreover, it was undisputed that she was paid such a commission in accordance with the same formula before she became a store manager and it was common cause that at all times she was always employed by Pandora her employment was governed by a written contract. The probabilities that she was paid a bonus commission which was not in her written contract in 2017 are remote. If anything, the concession made in the pre-trial minute is more aligned with the probable existence of such a provision in her 2017 contract of employment than not. In the circumstances, I do not find that the *dictum* in *Fourie* is applicable on the facts of this case.

[13] The next question is whether Pandora can escape liability on the basis of a bona fide mistake about the calculation of the target achieved. The firm argued that Phasha made significant concessions regarding whether her claim was based on a genuine error in setting the target sale figure.

[14] She had testified that the store sales target was set overseas by the head office in Italy. The sales target for the Victoria and Albert store where she was a manager was set at R 92,000 for November 2021. Phasha agreed that the sales targets for stores in other malls were significantly higher. For example, November 2021 sales targets for the stores in La Lucia, Eastgate and Canal Walk malls were set at R348,000, R729,000 and R 1.027 million respectively. She testified that because the V & A store target was so low she queried it with the regional store manager, who asked the financial department in head office, which confirmed that the target figure was correct. When the November 2021 sales figure became known, it had exceeded the stated targeted figure by 447%. By comparison, the November sales figures for the La Lucia, Eastgate and Canal Walk malls in relation to the targets set for those stores were 15 % and 19% below, and 6% above, respectively. The staff at the V&A store wanted clarity on what they would get after they learned they had apparently achieved sales equivalent to 547% of the target. There was considerable delay on the part of the company in responding

to their enquiry. Eventually, they were told in December 2021 that the target was supposed to have been R 550,000, but the company was prepared to reduce this to R 450,000. Phasha said it was never explained how the R 550,000 figure was arrived at. Nevertheless, it was on the basis of the revised figure that Phasha received a bonus of R 3000. Phasha agreed that she had never received a large bonus like the one she was claiming before.

[15] From the limited evidence it is apparent, right from the start, that Phasha herself doubted the correctness of the sales target set for the store. Even though it was initially confirmed by the finance department, it was more than R 240,000 lower than the lowest target of any other store, which happened to be the La Lucia store having a sales target of R 348,000 for November 2021. The V&A store sales target was markedly below the level of any other store. Phasha could not dispute that it was even below the monthly cost of the store rental. When the sales results were known, the V&A results were equally extraordinary compared to the store's own target sales figure and compared with the relative performance of other stores. This only serves to emphasise how anomalous and improbable the target sales figure for the V&A store was.

[16] Whatever the correct sales target should have been, based on the evidence discussed above, it is most unlikely that it could have been in the region of the figure of R 92,000, even though it was initially identified as correct. Plainly an error was made and that figure could not be relied on to establish an entitlement to the bonus claimed. Consequently, I am not satisfied, on a balance of probabilities, that Phasha has proven her entitlement to a bonus of R 44,000-00 for November 2021.

<u>Costs</u>

[17] Pandora made a "with prejudice" offer to pay Phasha her full claim, and to pay her costs on the magistrate court scale. The fact that she rejected what was a very reasonable offer, given the merits of her case, is something the court can consider in deciding if it would be appropriate to make an adverse cost order against her. It appears the only stumbling

block to her accepting the offer was that the costs which would be paid were at the magistrate's court scale.

[18] S 162(1) of the Labour Relations Act, 66 of 1995 ('the LRA') permits this court to make an order of costs, according to the requirements of law and fairness. Generally, the approach of the Labour Courts is to follow the approach laid down by the Constitutional Court in *Zungu v Premier of the Province of KwaZulu-Natal & others*[4], namely that the normal practice is not make cost awards. However, in *Baise v Mianzo Asset Management (Pty) Ltd* [5], the Labour Appeal Court held that in a civil claim, absent special circumstances, costs should follow the result.[6] It was argued that the Labour Court is a specialist court and that Phasha was entitled to have her case heard in this forum. That statement is correct, but its specialist jurisdiction concerns its sole remit to determine matters assigned to it in terms of the LRA. In civil matters, it is determining disputes on the same principles that are applicable in civil proceedings in the magistrate and high courts. There was no reason why this case could not have been conducted in a magistrate's court, given the quantum of the claim. Pandora's offer to pay Phasha's costs on the magistrate's court scale of fees was not inappropriate and she ought to have accepted the offer instead of proceeding with her claim.

[19] In the circumstances, Pandora incurred the unnecessary cost of preparing and presenting argument on 10 June 2024, and I see no reason why it should bear the ordinary costs thereof.

<u>Order</u>

1. The Plaintiff's claim is dismissed.
2. The Plaintiff must pay the Defendant's costs of preparing and presenting argument on 10 June 2024 on the magistrates court scale of costs.

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[4] (2018) 39 *ILJ* 523 (CC) at paragraphs 23 -25.

[5] (2019) 40 *ILJ* 1987 (LAC)

[6] At paragraph 48.

[redacted]

R G Lagrange

Judge of the Labour Court of South Africa.

Appearances:

For the Applicant: --- F Cronje from Cronjes Incorporated Attorneys

For the Respondent: --- Adv T du Preez

Instructed by: --- Van der Spuy and Partners